

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JAMES R. WATSON</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 220,529
<b>HOBART CORPORATION</b>	)	
Respondent	)	
AND	)	
	)	
<b>TRAVELERS INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

This case comes before the Appeals Board on remand from the Court of Appeals. The Court of Appeals opinion was filed December 10, 1999.

**ISSUES**

The Appeals Board originally awarded claimant benefits based on a 30 percent work disability. In its decision, the Board noted claimant had returned to work for respondent after the injury but had been terminated. The Board's decision was entered before the Court of Appeals issued its decision in *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, rev. denied 267 Kan. \_\_\_\_ (1999), and the Board made no specific finding as to the reason for claimant's termination. The Court of Appeals remanded for a finding as to the reason for termination and ruled that claimant would not be entitled to work disability if he was terminated for cause. The specific direction from the Court of Appeals was as follows:

We conclude this matter needs to be remanded for additional consideration by the Board to determine the impact of our decision in *Ramirez* on this case. Accordingly, we reverse the finding made by the Board awarding claimant permanent partial disability benefits and remand the matter for further consideration. On remand, the Board should make specific factual findings as to why claimant was terminated and should only award permanent partial disability benefits if it finds claimant was terminated because of his injuries or in retaliation for his workers compensation claim. If the Board finds that claimant was terminated for cause, no award for permanent partial disability benefits would be appropriate, and the Board should enter judgment to that effect.

In context, the Board construes the Court's reference to "permanent partial disability benefits" as a reference to work disability as the fact claimant was terminated for cause could preclude a work disability award but would not foreclose permanent partial disability based on

functional impairment under K.S.A. 1999 Supp. 44-510e. On remand, respondent argues the Board should find claimant was terminated for cause and award a permanent partial disability of 2 percent based on functional impairment. Claimant, on the other hand, argues he was terminated because of his injury or his workers compensation claim and asks the Board to award a work disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board finds claimant was terminated for cause and the award must be limited to disability based on functional impairment. The Board notes the more recent decision by the Court of Appeals in *Niesz v. Bill's Dollar Stores*, Docket No. 82,053 (Kan. App. 1999), recognizes the possibility of an award of work disability in some cases where the claimant was terminated for cause. But as the Board understands the directions of the Court of Appeals, which is the law of this case, work disability is not an option here if the Board finds the termination was for cause.

The evidence relating to claimant's termination comes primarily through the testimony of Steve Proffitt, a branch and district manager for respondent. He testified claimant was terminated because of poor customer relations. While the basis for the termination is not well documented, the Board nevertheless accepts as true Mr. Proffitt's testimony. Mr. Proffitt testified, and the records show, that in May 1996, before the November 1996 accident, respondent counseled claimant about unprofessional behavior with the managers of some of respondent's customers. Claimant was advised at that time that he would be put on a professional development program if the behavior continued.

There were additional customer complaints and in October 1996, still before the accident in this case, respondent placed claimant on a professional development program. This was a form of probation with claimant expected to show improvement or face further disciplinary action, including possible termination. The development program was to last three months, but the program was suspended after claimant's injury and then reinstated when he returned to work.

In March 1997, respondent terminated claimant, citing additional customer complaints. Claimant has argued respondent has failed to prove there were complaints after claimant's injury and contends respondent terminated claimant because of the injury and/or the workers compensation claim. As indicated, the record does not include documentation of the customer complaints and Mr. Proffitt did not, when he testified in 1998, recall the complaints after the injury. He did recall some general information about complaints before the injury. These factors call into question Mr. Proffitt's testimony. But Mr. Proffitt testified he would not be the person who kept records of complaints. He was the person who advised the employee of the termination. In addition, the termination document itself, dated March 24, 1997, refers to "the last two incidences with employees of John's Super and Hy Vee." These would have

been the recent complaints which explain the decision to move from the development program to termination. The Board finds claimant was terminated for cause.

Since claimant was terminated for cause, the wage claimant was earning is imputed to claimant and his postinjury wage treated as 90 percent or more of the preinjury wage. The disability is, for that reason, limited under K.S.A. 44-510e to the functional impairment.

The Board finds claimant's functional impairment attributable to this injury is 4 percent. This conclusion takes into consideration ratings by Dr. Robert R. Brown and by Dr. P. Brent Koprivica. Dr. Brown testified that the November accident caused claimant an additional 1 to 2 percent whole person impairment. Dr. Koprivica stated claimant has an additional 5 percent impairment due to this injury.

### **AWARD**

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, James R. Watson, and against the respondent, Hobart Corporation, and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred November 6, 1996, for 8.57 weeks of temporary total disability compensation at the rate of \$338 per week or \$2,896.66, followed by 16.6 weeks at the rate of \$338 per week or \$5,610.80, for a 4% permanent partial disability, making a total award of \$8,507.46, all of which is presently due and owing in one lump sum less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Clark H. Davis, Olathe, KS  
Gregory D. Worth, Lenexa, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director